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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RALPH P. KATZ
DELSON & GORDON
230 Park Avenue
New York, New York 10169
(212) 661-9800

Counsel for Petitioner

QUESTIONS PRESENTED

In circumstances where the refusal to perform all work would be a "protected" economic strike, is a strike in the form of a refusal to perform only all overtime work "protected" or "unprotected"?

When during negotiations, after a collective bargaining agreement has expired, a union's members have voted to engage in an admittedly legal, partial economic strike by banning all overtime work, and where the union's membership has also voted to establish a fine for violations of the overtime ban by fellow members, is it a violation of Section 8(b)(1)(A) of the National Labor Relations Act for the union thereafter to impose that fine on members who have been properly found to have broken the partial economic strike by performing overtime work?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner GAIU Local 13-B, Graphic Arts International Union (the "Union"), respondent in the proceeding below, respectfully prays that a writ of certiorari issue to review the judgment in this matter of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-18a) is officially reported at 682 F.2d 304. The decision and order of the National Labor Relations Board (App. C, infra, 21a-38a) are reported at 252 N.L.R.B. 936.

JURISDICTION

The judgment of the Court of Appeals (App. B, infra, 19a-20a) was entered on June 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(A) is:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

The relevant parts of other statutory provisions, the consideration of which is necessary and appropriate, but whose construction is not directly involved, are set forth in Appendix D.

STATEMENT

The Union represents some 500 employees engaged in production and related activities at the Poughkeepsie, New York plant of Western Publishing Co., Inc. (the "Employer"), a publisher of books and similar materials. The Employer also has plants in Wisconsin and Missouri. Following the expiration on May 16, 1978[1] of the collective bargaining agreement between the Employer and the Union, the parties continued to negotiate while the employees continued to work without a

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1 All dates are in 1978.

contract. The employees were obligated under the terms of their employment to perform paid overtime work when assigned by the Employer.

On August 23 the Union accused the Employer of bargaining in bad faith and of attempting to undermine it,[2] and advised the Employer that it would seek "strike" authorization. A Union membership meeting was held on August 28 at which 320 out of a membership of 490 were present. The members did not vote for a full economic strike but, 220 to 100, they voted to adopt a rule, effective immediately, prohibiting members from performing all overtime work. All employees were notified in writing of the overtime ban, and the Employer was notified in writing of the Union's position that "any disciplinary action and/or discharge of any member of Local 13-B for the observance of [the overtime ban] shall be considered an action taken against all of the members and will be treated by the Local as a lock out."

At a subsequent Union membership meeting the members voted to impose a fine as discipline on any member who thereafter worked overtime in violation of the Union's partial economic strike.

The Employer never agreed to the overtime ban, but it discontinued the assignment of overtime for about two months and, at about the time that it decided to reassign overtime, the Employer wrote at least four times to its employees notifying them that it would not discipline them for refusing overtime work, asking them to work overtime despite the ban and to hold another Union vote to rescind the overtime ban, reminding them of the wages they had lost and were losing by complying with the ban, advising them of their right to resign from the Union and thereby to be free from any Union discipline for working overtime, assuring them of the legal

2 Complaints issued by Region 3 of the National Labor Relations Board (the "NLRB") on Union unfair labor practice charges thereafter brought against the Employer were disposed of by a settlement agreement.

protection of their jobs should they resign from the Union, and threatening them with the possibility of hiring replacements if that were needed.

Thereafter at least 17 Union members worked overtime and through internal Union charges they were found to have acted against the Union's partial economic strike and were fined in accordance with the membership vote. Lawsuits were commenced against two members to effect collection of the fines.

A member who had been fined filed a complaint with the NLRB against the Union on December 6 charging that the enforcement by the Union of its internal rule requiring membership support of its partial economic strike was an unfair labor practice. After a hearing on the charge the Administrative Law Judge found no violation of law and recommended dismissal. The NLRB reversed. It first held that strike participants were "unprotected" because the ban on all overtime work was a partial, rather than a full economic strike. The NLRB then held that the proviso language of Section 8(b)(1)(A) did not govern because enforcement of discipline against a union member for refusing to engage in an unprotected activity coerced the member in violation of his Section 7, 29 USC § 157, right to refrain from concerted activities. The Court of Appeals enforced the order the NLRB.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

This case presents two important questions of federal law which have not been, but should be, settled by this Court.

This Court has recognized in its decisions the existence of precisely the first of these questions, but has refrained from passing on it in cases not requiring its determination, calling for "case-by-case adjudication". *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 152 ftnt. 14 (1976); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 492-493 and ftnt. 22 (1960).

This is the case for adjudication.

The second question has never been before this Court in the setting which this case presents. Although this Court has on numerous occasions responded to the need for explication of Section 8(b)(1)(A) and the built-in tension generated by the proviso thereto, this case presents the Court with an opportunity further to delineate this murky area and to refine the general language of its decision in *Scofield v. NLRB*, 394 U.S. 423 (1969).

It is important to settle the questions presented because they arise out of the exercise of a common, recurring economic weapon in the interplay of the economic forces which accompany collective bargaining. This Court has already found that a refusal to work overtime as a means of imposing economic pressure on a bargaining employer is not prohibited. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); see *NLRB v. Insurance Agents' International Union, supra.*

This case will determine some of the legal consequences flowing from the use of this tactic and, therefore, will significantly affect the frequency of its employment.

It is also important to settle the questions presented because it is necessary to harmonize three apparent differences in basic federal labor policy which this case presents.

> The judgment to which this petition is directed discourages the working of full, complete work weeks, except for overtime, and encourages full, complete strikes in apparent conflict with basic federal policy to protect interstate commerce from such interruptions. 29 U.S.C. §§ 141, 151, 401.
>
> The judgment to which this petition is directed injects the N.L.R.B. into the arena of economic warfare, by preferring one weapon over another, in apparent conflict with basic federal policy to abstain from such involvement. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

> The judgment to which this petition is directed injects the government into the internal affairs of labor unions in apparent conflict with basic federal policy which severely limits such intervention and which is designed to foster union responsibility through democratic membership participation. *NLRB v. Boeing Company*, 412 U.S. 67 (1973); *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 176 (1967); see *United Steel Workers of America v. Sadlowski*, (50 U.S. Law Week 4626, decided June 14, 1982); *International Brotherhood of Boilermakers, etc. v. Hardeman*, 401 U.S. 233 (1971).

The position of the petitioner is that employees who engage in a partial economic strike by refusing to work all overtime should be afforded the same "protected" status as employees who engage in a full economic strike.

The position of the petitioner is that, even if such employees are not granted "protected" status, a union fine to discipline its own members for breaking a legal strike is not a violation of law.

The State of the Law With Respect to the Issue of Whether Employees Who Engage in A Partial Economic Strike By Refusing To Work All Overtime Are "Protected" or "Unprotected"

This Court has held that employees who engage in a full strike to enforce collective bargaining demands are entitled to certain protection, namely: the right to return to their jobs, if the jobs still exist, unless they were permanently replaced during the strike by other employees. *NLRB v. Mackay Radio & Telegram Company*, 304 U.S. 333 (1938). In its decision this Court explored the applicable legislative history.

This Court has held that employees who engage in certain types of strike conduct, such as a sit-down strike which violates the employer's property rights, are not entitled to protected status. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240

(1939). In its decision this Court explored the applicable legislative history.

This Court has recognized that there are many variations between a full, economic strike which is a "normal" and "traditional" weapon (*NLRB v. Insurance Agents' International Union* 361 U.S. 477, 495 (1960) and, for example, the sit-down strike. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra; NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 491-496 (1960).

One of the variants is a refusal to work all overtime. This Court, as noted, has held that a refusal to work overtime for the purpose of putting economic pressure on an employee is not prohibited or illegal. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976); see *NLRB v. Insurance Agents' International Union, supra.* In these decisions this Court explored the applicable legislative history.

But this Court has specifically left for further adjudication the question of the "protected" or "unprotected" status of partial economic strikers who refuse to work all overtime. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 152 ftnt. 14 (1976); *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 492-493 and ftnt. 22 (1960).

The actions of other courts and the NLRB on this issue will be presented and discussed in connection with the analysis of the Court of Appeals and NLRB decisions in this case.

The State of the Law With Respect To The Issue of Whether A Union Fine To Discipline a Member Who Breaks A Partial Economic Strike Violates Section 8(b)(1)(A) of the National Labor Relations Act.

This Court has held that a union fine to discipline a member who breaks a full economic strike does not violate Section 8(b)(1)(A). *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 176

(1967). In its decision this Court explored the legislative history of that provision as well as the applicable legislative history of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq., particularly 29 U.S.C. §§ 411(a)(2), 411(a)(5), 529.

This Court has held that union fines, though coercive in effect, do not violate Section 8(b)(1)(A) because of that characteristic. *NLRB v. Boeing Company,* 412 U.S. 67 (1973).

This Court has held that employees may avoid union discipline by the simple expedient of resigning their memberships and removing themselves from the union's authority. *Booster Lodge No. 405, IAM v. NLRB,* 412 U.S. 84 (1973); *NLRB v. Granite State Joint Board, Textile Workers Union of America, Local 1029,* 409 U.S. 213 (1972).

This Court has held that a union violates Section 8(b)(1)(A) where the union rule itself is contrary to the plain policy of the Act. *NLRB v. Industrial Union of Marine Shipbuilding Workers,* 391 U.S. 418 (1968) (depriving members of the right to complain to the NLRB without first exhausting intra-union channels).

Finally, this Court stated the general legal principle in this area in a case where it found that union discipline to enforce a rule establishing a production quota did not violate Section 8(b)(1)(A). In *Scofield v. NLRB,* 394 U.S. 423 (1969), this Court wrote at 394 U.S. p. 430:

> "Under this dual approach, § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. This view of the statute must be applied here."

Scofield gave rise to what has been called the "public policy exception". Six years ago a commentator was already lament-

ing "[t]he indefinite boundaries of such 'policy' exceptions" and wrote that:

> "without further clarification from the Court the contours of this public policy exception will remain vague. This is particularly unfortunate. The tension between union solidarity and individual rights is most marked during a strike. It is at this time that the individual union member is in the greatest need of clear definition of his rights and liabilities concerning nonconforming conduct."

Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1025, 1026 (1976).

This case provides the Court with the opportunity to sharpen the boundaries of the law and clarify rights and obligations.

The actions of other courts and of the NLRB on this issue will be presented and discussed in connection with the analysis of the Court of Appeals and NLRB decisions in this case.

ANALYSIS OF THE NATIONAL LABOR RELATIONS BOARD AND COURT OF APPEALS DECISIONS IN THIS CASE

Neither the two Member majority decision nor the concurring decision at the NLRB level follows this Court's injunction that the determinations required in this matter be adjudicated on a case-by-case basis. The approach of the NLRB was run-of-the-mill.

For example, at Appendix C (p. 27a) the NLRB writes:

> "It is well established that a union violates Section 8(b)(1)(A) of the Act if it disciplines members who refuse to engage in unprotected activity which would subject them to lawful discipline by their employer."

To support that proposition the NLRB cites only *John Hancock Mutual Life Insurance Co.*, 236 NLRB 440 (1978). The

case is miscited. The NLRB in *John Hancock* found that the union did *not* violate Section 8(b)(1)(A) writing:

> "We agree with the Administrative Law Judge that Respondent [the Union] did not violate Section 8(b)(1)(A) of the Act by threatening to discipline and actually initiating intraunion disciplinary proceedings against certain of its members because they refused to participate in union-sponsored 'luncheon demonstrations' ". 236 NLRB at p. 440.

In accordance with its decision the Board ordered that "the complaint be, and it hereby is, dismissed in its entirety." 236 NLRB at p. 441.

In support of its ultimate holding the NLRB cited only dictum in one case. This is hardly "well established" law.

Without so stating, the NLRB overruled its only other case in point: *Bay Counties District Council of Carpenters (Associated Home Builders of the Greater East Bay, Inc.),* 145 NLRB 1775 (1964). In *Bay Counties*, production quotas were set by union rule and were not agreed to by employers. 145 NLRB at 1780. Therefore, unlike the situation in *Scofield,* the employees were subject to employer discipline, including discharge, for conduct "contrary to the language in their collective bargaining agreements". 145 NLRB at 1780. The NLRB specifically stated, contrary to the expressions of the Trial Examiner, that the imposition of union fines for the breach by members of this rule was not a violation of Section 8(b)(1)(A) and fell within the proviso to that Section. 145 NLRB at 1776.

This ruling by the NLRB was reviewed at length by the Court of Appeals for the Ninth Circuit in *Associated Home Builders of the Greater East Bay, Inc. v. NLRB,* 352 F.2d 745 (9th Cir. 1965). *Associated Home Builders* is distinguishable from this case because the union rule there apparently required conduct in violation of collective bargaining agreements. In the instant case the union rule calls for conduct which is wholly legal. The court in *Associated Home Builders,* after a discus-

sion of the issue, declined to rule on it as a determination was unnecessary for the disposition of the case, 352 F.2d at p. 750-751; but unlike the decisions of the NLRB and the Court of Appeals in this case, the Ninth Circuit examined the legislative history as well as case law.

The NLRB likewise announced and supported its holding on the other issue presented by this petition (the protected or unprotected status of partial strike conduct) in one short sentence, without any reference to the statute or to legislative history and without any ratiocination. Where this Court and the Ninth Circuit were cautious and saw gradations, the NLRB proclaimed that the law was "clear" (App. C., p. 27a). In support of its proposition the NLRB cited two cases *John S. Swift Company, Inc.*, 124 NLRB 394 (1959) *enforced* 277 F.2d 641 (7th Cir., 1960) and *Honolulu Rapid Transit Company, Ltd.*, 110 NLRB 1806 (1954).

Honolulu Rapid Transit, supra, is notable for three things: it relied at 110 NLRB at 1810 on the decision of this Court in *Auto Workers, Local 232 v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949), *reh. den.* 336 U.S. 970 (1949), which decision was overruled in *Lodge 76, IAM v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 152 (1976); it relied at 110 NLRB at 1810-1811 on *Valley City Furniture Company,* 110 NLRB 85 (1954), which decision the majority in this very case "consider incorrectly decided" (App. C., p. 28a, ftnt. 16); and it relied on *C.G. Conn, Ltd. v. NLRB,* 108 F.2d 390 (7th Cir. 1939), which decision is discussed below in the analysis of the Court of Appeals decision.

The NLRB in *John S. Swift Company, Inc., supra,* engaged in no statutory analysis, no review of the legislative history, no reasoning: it simply cited *C.G. Conn. Ltd. v. NLRB, supra,* and some other decisions. The Court of Appeals in *NLRB v. John S. Swift Company, Inc.*, 277 F.2d 641 (7th Cir. 1960) likewise, at p. 646, simply relied on *C.G. Conn. Ltd. v. NLRB, supra.* But on another matter of importance to this case the court spoke importantly. It held that employees who struck to protest the discharge of fellow employees who had complied with an overtime ban were protected and "enjoy statutory

protection as economic strikers". 277 F.2d at 646. The Union, here, threatened such action to protect its fellow members.

The decision of the Court of Appeals holds up no better to analysis. It, too, wholly failed to look closely at the statute; it ignored legislative history; it made statements concerning the law, but did not examine the particular economic facts as this Court did, for example, in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Court of Appeals, as the NLRB, accepted as settled law that the status of the partial, economic striker is unprotected. It ignored this Court's prescription to proceed on a case-by-case basis and its statement that this was an open question.

The first case cited by the Court of Appeals, *Excavation-Construction, Inc. v. NLRB*, 660 F.2d 1015, 1020-21 (4th Cir. 1981) relied wholly on *C.G. Conn, supra.* It engaged in no independent analysis of the question of the status of partial, economic strikers who work a full work week except for overtime. The second case cited by the Court of Appeals, *First National Bank of Omaha v. NLRB*, 413 F.2d 921 (8th Cir. 1969) found that the employees had the status of economic strikers and were protected. The case may be cited only as dictum and, as most others, relied on *C.G. Conn, supra.*

The third and last case relied on by the Court of Appeals to support its holding that employees who refuse to perform overtime are unprotected is *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939). This is one of a few, if not the only, decision which explored the question rather than simply falling back on unexamined precedent. The first matter of note is that the court in *C.G. Conn* did *not* hold that employees who refuse only to work overtime are unprotected. After some exploration of the question it wrote at 108 F.2d at 398:

> "Because of the importance of the question presented, however, we are not satisfied that our ultimate conclusion be predicated upon the reasoning thus far employed. For the purpose of what follows, we shall assume the Board was correct in holding that a strike ensued, that there was no valid discharge of the employees and, that the relation of employer and employee remained undisturbed."

The second matter of note is that much of the Court's speculation on the question of the status of the employees depended on whether they could properly be considered "strikers". It found that the withholding of services limited to the refusal to perform overtime work was not a "strike" using the definition given in the *American and English Encyclopedia of Law,* Vol. 24. 180 F.2d at 396-397.

The Court in *C.G. Conn* was writing in 1939. It is now unquestioned that under federal law the withholding of labor limited to overtime hours is a "strike". 29 USC § 142(2); *NLRB v. Local 742, IUE,* 519 F.2d 815 (6th Cir. 1975).

Thus, the decision to which the petition is directed, despite this Court's clear concern with this question as evidenced in *Lodge 76, IAM v. Wisconsin Employment Relations Comm., supra,* and *NLRB v. Insurance Agents' International Union, supra,* simply relied on other decisions without independent reasoning or research. On analysis, two of those decisions are found to be dicta and the third relies on *C.G. Conn* which specifically eschews rendering a decision on the very question for which it is relied.

To the extent that the Court of Appeals explicated its decision, its reasoning is faulty. The court below wrote, at App. A, p. 8a, "To permit an employee in such a fashion unilaterally to dictate the terms and conditions of his employment could lead to chaos."

The above reason has already been examined by this Court and found to be "baseless". *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 496 ftnt. 28. This Court had no trouble in discerning that a refusal to work overtime to put economic pressure on an employer is not an attempt unilaterally to change the terms and conditions of work—it is a partial strike.

Moreover, instead of dealing with the facts of this case, on a case-by-case basis, the Court of Appeals spoke in general terms at App. A, p. 8a and visualized potential "chaos". The facts *of this case* provide no basis for such a conclusion.

Indeed, if we examine the relative merits of overtime bans, other economic weapons, and full strikes, we suggest that overtime bans should be preferred, not discouraged. In this connection it is instructive to look at the union conduct in *Insurance Agents'* and in *UAW, Local 232 v. Wisconsin Employment Relations Board* (Briggs-Stratton) 336 U.S. 249 (1949), which decision was overruled on an issue not relevant to this point in *Lodge 76, IAM v. WERC,* 427 U.S. 132, 152 (1976). In both *Insurance Agents'* and *Briggs-Stratton* this Court found that the union conduct was *not* proscribed by the National Labor Relations Act.

In *Insurance Agents'* the Supreme Court described the employees' conduct thusly at 361 U.S. 477, 480-81:

> ". . . the union's harassing tactics involved activities by the member agents such as these: refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's 'May Policyholders' Month Campaign'; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices, instead engaging there in 'sit-in-mornings,' 'doing what comes naturally' and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions to the company at its home office while simultaneously engaging in mass demonstrations there."

In (Briggs-Stratton) the union, on twenty-six occasions between November 6, 1945 and March 22, 1946, called "meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend. It was an essential part of the plan that this should be without warning

to the employer or notice as to when or whether the employees would return." 336 U.S. 245, at p. 249.

It is important to distinguish the conduct of the unions in *Briggs-Stratton* and *Insurance Agents'* from the conduct of the Union in the instant case, because the effect of the former was to "put strong economic pressure on the employer, who was disabled thereby from making any dependable production plans or delivery commitments." 336 U.S. at p. 249.

It is again noted that the Supreme Court found that the union conduct in *Insurance Agents'* and *Briggs-Stratton* was not proscribed by the Act. However, it is this aspect of a union's conduct, i.e. the creation of a state of uncertainty which prevents dependable planning, which appears to underlie those decisions which label such conduct unprotected. For example, in *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), in a decision holding the employer to have committed unfair labor practices and finding the union action therein to be protected, the court wrote the following dictum at 497 F.2d P. 1203:

> "Unprotected activities closest to the facts in this case have generally involved situations where the employees have reported for work and, while receiving their usual wages, have repeatedly and without warning engaged in work stoppages, slowdowns or sit-ins. Such actions disrupt production schedules and impede the employer from using replacement or temporary employees while the protesting employees continue to draw their wages. Thus, they are unprotected because they make it impractical for the employer to operate his business properly."

The above reasoning flies directly counter to this Court's teaching that Congress saved economic tactics and devices from intervention just because they were especially effective (*Insurance Agents*, 361 U.S. 477, 496) or because they were not "traditional" or "normal" (*Insurance Agents*, 361 U.S. 477, 495), or because the employer "was disabled thereby from making any dependable production plans or delivery commit-

ments." (*UAW, L. 232 v. WERC*, 336 U.S. 245, 249). Nevertheless, even if it were the law, the Union conduct in this case would not be condemned. The Employer in this case knew, in advance, those hours which would not be worked. The Employer knew exactly how many working hours there would be to schedule, and exactly when those hours would be worked— a full work week would be worked without overtime. The employees would not receive wages for time not worked. Indeed, the Employer made a propaganda point of this. Replacement or temporary employees could be used. The Employer also made a propaganda point of this. Dependable production plans and delivery commitments could be made.

The livability of the overtime ban is made evident by the Employer's reaction to it in this case.

On the second question, whether the fine is a violation of Section 8(b)(1)(A), the Court of Appeals wholly failed to consider the question presented to it and to this Court, namely: whether the fine, even if the employee-members are unprotected, violates Section 8(b)(1)(A). This question was totally ignored; no legislative history was examined; and no consideration was given to the questions of federal labor policy, which questions must be addressed if there is to be an attempt to harmonize the various Congressional enactments in this field.

The Court of Appeals did not cite one case in point to support its conclusion that the imposition of the fine in this case violated Section 8(b)(1)(A). It simply bootstrapped itself to that position by cursorily finding that the employee-members were "unprotected" and then stating that the imposition of the union fine "is impermissable since it jeopardizes the members' employment relationships". (App. A., p. 10a).

The foregoing conclusion is especially surprising from the Court of Appeals for the Second Circuit as it appears to be directly in opposition to that court's decision in *Glasser v. NLRB*, 395 F.2d 401 (2nd Cir. 1968). In *Glasser* the NLRB found and held, and the Court of Appeals after consideration affirmed, that the enforcement by fines of a union rule

prohibiting a member from working with "suspended or expelled members or with nonmembers. . ." is not a violation of Section 8(b)(1)(A). There could hardly be a union rule which more directly "jeopardizes the members' employment relationships", yet the Court of Appeals for the Second Circuit wrote:

> "So far as Section 8(b)(1)(A) is concerned, we agree with the Board that the enforcement of this bylaw as against employee members of the Federation, even if restraint or coercion within the meaning of the statute, is nevertheless excepted from its prohibitions by the proviso that such prohibitions 'shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.' It was expressly so held with respect to a substantially identical bylaw in American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782, 787, 800-801 (7th Cir. 1951). See also Scofield v. NLRB, 393 F.2d 49 (7th Cir. March 5, 1968). And in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967), the Supreme Court has very recently held that Section 8(b)(1)(A) did not prevent a union from seeking court enforcement of fines levied against members who crossed the union's picket line during an authorized strike against their employer. In so ruling, the Court concluded that Congress, in enacting Section 8(b)(1)(A), did not intend "to interfere with union self-government or to regulate a union's internal affairs." Id. at 184, 87 S.Ct. at 2009. In light of the Supreme Court's construction of Section 8(b)(1)(A) in *Allis-Chalmers,* we conclude that the bylaw here in question is protected by the proviso to that section."

Accord, *Home Box Office, Inc. v. Director's Guild of America,* 531 F.2d 578, 602-603 (USDC, SDNY 1982).

Thus, the reason behind the ultimate holding by the Court of Appeals appears to be belied by its own decision and that of a court within its circuit.

THE NECESSITY OF HARMONIZING FEDERAL LABOR POLICY

The difficulty of relieving the tension produced by the language of Section 8(b)(1)(A) and the proviso thereto, and the interrelationships in the field of union discipline among federal statutory enactments have been remarked upon and explored by this and other courts. *NLRB v. Allis-Chalmers Mfg. Co.*, 338 U.S. 176 (1967) (NLRA and LMRDA); *Vandeventer v. Local No. 513, Operating Engineers*, 579 F.2d 1373, 1376-1379 (8th Cir. 1978) (LMRDA and NLRA, as amended by LMRA) and in *Brady v. Local 551, Air Transport Division, TWU*, 439 F. Supp. 1190, 1195-1196 (USDC, SDNY, 1977) (LMRDA and Railway Labor Act).

The decision of the court below raises some very troublesome questions of basic federal labor policy. It appears to run counter to three of the fundamental goals of such policy as enacted by Congress and as found and expounded by this Court.

The underpinning of federal legislation in this field is the Commerce Clause, U.S. Const. art. 1, § 8. Each of the three principal Acts of Congress in the field of labor-management relations declares as its principal purpose the elimination or reduction of burdens and obstructions to commerce. 29 U.S.C. §§ 141, 151, 401. Yet the decision to which this petition is directed discourages an economic weapon which is limited to the refusal to work only overtime hours while it encourages complete work stoppages.

Such result is not only counter to basic federal labor objectives, but also flies in the face of common sense. Even when a union believes that limited economic pressure will be sufficient, if effective, it will now be required to engage in an all-out strike if it desires to be able to enforce a rule against strike breaking. It was Senator Morse who, during the debates on the Labor-Manangement Reporting and Disclosure Act, 29 USC

§ 401, et. seq., said: "He is therefore forced to use an artillery shell to kill a mouse." II NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1190 (1959).

The result produced by the decision of the court below appears in this regard, at least, to be absurd. If such a result is not compelled by the law, it should be avoided.

Another basic federal policy in this field is that the parties are to be left to their own devices, unless specifically restricted, in the spheres of collective bargaining and in the choice and application of the economic pressures which accompany such negotiations. Moreover, this general policy was found in the Act and in its legislature history in a case in which the NLRB was specifically directed by this Court not to inject itself into the sphere of collective bargaining by preferring one type of tactic to another in the contest of economic forces, *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

The effect of the decision of the court below is precisely what this Court found improper in *Insurance Agents'*. By holding that union discipline against strike breakers during a partial economic strike through the tactic of a refusal to work all overtime violates the Act, while reaffirming the legality of union discipline during a full economic strike, the NLRB is preferring one tactic over another.

Such intervention by the NLRB is particularly inappropriate in this case as this Court, in *Lodge 76, IAM v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 141 (1976) specifically stated that the Congressional intent was to permit the use of overtime bans as one of the tactics in "the free play of economic forces".

Thus, a consequence of the decision of the court below appears to run counter to another basic federal policy.

A third undergirding of federal labor policy is the determination to foster democracy in labor unions and to permit

unions, except where specifically restricted, to run their own affairs. This policy has found its most visible expression in the provisos to 29 USC §§ 158(b) (1)(A), 411(a)(1), 411(a)(2), and 411(a)(4). It is further found in the limited scope of 29 USC §§ 411(a)(5) and 529. The visible expression of that policy is reinforced in the legislative history, much of which was reviewed in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 176 (1967).

The federal policy in this area, as noted, is two-fold: it is to foster self-rule by union members as well as to keep the government out of internal union except as specifically invaded by statutory provision.

Thus, in *Allis-Chalmers, supra,* the Supreme Court quoted approvingly from Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 Yale L.J. 1333 (1958): "The majority-rule concept is today unquestionably at the center of our federal labor policy." 388 U.S. at p. 180.

The Court of Appeals for the Second Circuit, in *Navarro v. Gannon,* 385 F.2d 512 (2nd Cir. 1967), explored this policy of the federal labor law in another context and wrote: "The principle of union democracy encompasses, as Clyde Summers has said, 'the right to choose, even unwisely, [for] self-government is self-fulfillment.' " 385 F.2d at p. 519.

In this case we have in practice the democratic involvement and action which the courts have applauded and the law seeks to foster. Here the particular job action and the specific discipline were both determined by democratic votes of the membership. To intervene to set aside the Union's right to discipline its members in the very way that they have themselves decided, because the members voted not to work overtime rather than not to work at all, not only contravenes the members' right to determine their own destiny, but it chills membership participation if their actions are so susceptible to governmental veto.

The facts of this case provide a happy example of the soundness of the federal policy of non-intervention in both the areas of collective bargaining and the play of economic pressures attendant thereto and in the area of internal union affairs. It is the thesis of the petitioner that although the members have the right, as Professor Clyde Summers wrote "to choose even unwisely", Summers, *Democracy in Trade Unions,* The New Leader, February 10, 1958, p.7, the members of this Union in this case knew better than the NLRB how to protect themselves.

The NLRB and the court below have written of a legalistic status of "protected". The members of the Union, being in the real world and not in the world of legal theory, opted for what they saw as the more protected route. Justices of this Court have frequently noted that at times when the law looks only to itself it is dealing with an "unreality" and adopts "a formalistic procedural approach". *Carlson v. Green,* 446 U.S. 14, 31 (1980) (Rehnquist, J., dissenting); *Kovacs v. Cooper,* 336 U.S. 77, 89 (1949) reh. den. 336 U.S. 921 (1949) (Frankfurter, J., dissenting).

The written record before the court below in this case records the argument of the General Counsel of the NLRB in support of the proposition that the Union violates the Act by imposing discipline on a member for violating a rule which, he also agrued, left the member "unprotected". The argument reads, in material part, as follows:

> "When employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers—a status contemplating a risk of replacement and a loss of pay . . . employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing to perform all the work they were hired to do."

What kind of "protection" is there in "a risk of replacement and a loss of pay"? No wonder these Union members chose a limited action retaining their pay (*that* is economic protection)

and protecting themselves from discipline from their Employer by agreeing among themselves, and notifying the Employer, that discipline against a member for not working overtime would be considered a lock out. Thus, the members here provided for their own job protection while providing for their own economic protection.

Not only do union members prefer limited work actions with limited economic harm to themselves, rather than full strikes; so do employers. This very case, again, is a good example. The Employer, faced with an overtime ban, continued his operations. How, is his business; but the following options are open to employers generally: (1) farm out work to other plants in the same business enterprise where there is no labor action; (2) subcontract; (3) hire additional employees and do work within regular working hours; (4) accept most business from all customers, but turn away only that which would require overtime; (5) accept all business from favored customers and turn away marginal ones; (6) replace some employees permanently with non-Union member employees who will work overtime; (7) hire part time help to work after the plant's regular hours.

An employer can even accomplish for himself what the NLRB policy promotes: he can lock out his employees and shut down his business.

But employers rarely respond to an overtime ban-partial economic strike by a lock out. Indeed, no case has been found. There are major economic adantages in keeping a business going, even if it is not going at full speed. Among them are the continuity of customer contact, the maintenance of equipment in running order, and the relatively better profit and loss position. Maintaining the operation of the business enterprise, even without overtime, is advantageous particularly in view of the continuity of certain overhead costs such as debt service, rent, non-income taxes such as franchise and real property, and the need (usually met through continued payments) of retaining valuable non-bargaining unit employees such as salesman, executives, and certain clerical employees. Moreover, the em-

ployer knows that if he replaces employees who observe the overtime ban he may be inviting a full fledged strike.

Through the decision below, the federal government has injected itself into this interplay of economic forces assertedly to protect a union member from being disciplined for violation of a union policy which exposes him, the NLRB and the court below maintain, to the economic risks which attend an unprotected overtime ban so that he may be subject to the economic and job replacement risks, so baldly presented by the General Counsel, of a full economic strike.

If an employee wants the benefits, rights and privileges of union membership then, just as a citizen, he must accept the obligations and sacrifices which go with it. But what makes this governmental interference excessive, as well as statutorily unfounded and economically nonsensical, is that a union member has it in his hands to protect himself from union discipline. He may resign from the union.

Thus, even if this Court were to find a full overtime ban to be "unprotected" conduct, union discipline through fines against members who break such a partial, legal, economic strike is protected by the proviso to Section 8(b)(1)(A).

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Ralph P. Katz
Delson & Gordon
230 Park Avenue
New York, New York 10169
(212) 661-9800
Counsel for Petitioner